In the same case Lord Denning also referred to Lord Parker in *In re H.K. (An Infant)*[14] as having said on page 630: —

"Even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the sub-section, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not a question of acting or being required to act judicially, but of being required to act fairly."

The trend of modern decisions, as it seems to me, would negative the suggestion that as a condition precedent to its applicability it must be established that the respondent has some right before the principle *audi alteram partem* can be applied. In the course of his arguments the learned Solicitor-General has referred to the case of *Regina* v. *Senate of the University of Aston, Ex Parte Roffey and Another*,[11] apparently, in support of his proposition. As I understand the judgment in that case, Donaldson J. clearly rejected a submission somewhat similar to the one before us. Admittedly in that case relief was refused but this was because the person seeking relief was found to have slept on his right far too long to justify interference; and interference is, of course, a matter within the discretionary power of the court.

Finally, I come to the question of costs. As may be noticed, the respondent had proceeded by way of an action for a declaration. This in itself may not be objectionable. But he also claimed damages which was rightly dismissed by the trial court. But the reason which leads me to the view that he should not get costs altogether is because he failed to exhaust the remedies open to him under the law before coming to court. After the rejection of his appeal by the Board of Governors, he could or should have appealed further to the Minister. He had the right to do this under regulation 10. On record he did not appear to have done so and I regard this as a serious omission. Successful though he may be in this appeal, he cannot have costs here or below. There will be no order as to costs.

Suffian Ag. L.P.: I have had the advantage of reading in draft the two judgments that have just been delivered, and with respect I concur with the judgment of my brother Gill.

Accordingly the order of the court is that this appeal be allowed with costs here and below.

Appeal allowed.

Solicitors: *Nadchatiram Bros.*

PUBLIC PROSECUTOR v. SAIMIN & ORS.

[R.Cr.J. (Sharma J.) February 25, 1971]

[Muar — Criminal Revision No. 18 of 1970]

Criminal Law and Procedure — Charge — Prima facie case alleged to be made out — Magistrate not satisfied with prosecution case — Accused called on to explain themselves — Whether magistrate has duty to acquit and discharge accused at close of prosecution case.

Evidence — Duty of prosecution to prove charge — "Reasonable Doubt" — Meaning of.

Penal Code, s. 379 — Theft.

The three accused were charged under section 379 of the Penal Code for having committed theft of 800 cocoanuts said to be valued at $104. At the end of the prosecution case the learned magistrate ruled that there was a *prima facie* case for the accused to answer, but subsequently said: "I am making this ruling not because I am satisfied with the case of the prosecution but because I want the accused to explain for themselves".

Having called upon the accused for their defence and having heard all of them, he observed: "Having heard all the evidence the court is partially satisfied that the charge has been proved since the accused have not given any reasonable explanation as to the charge against them. However, in view of the facts which have been given by P.W.3 and P.W.4 whom the court feels have an axe to grind, the court is taking a lenient view of their offences."

Held: (1) it is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation, on his part but on the positive affirmative evidence of his guilt given by the prosecution;

(2) a conviction cannot be sustained even if the court is satisfied that the prosecution story "may be" true unless and until it is found that the prosecution story "must be true". The burden of proof remains on the prosecution throughout the trial. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt;

(3) evidence discloses a *prima facie* case when it is such that *if uncontradicted* and *if believed* it will be sufficient to prove the case against the accused. Therefore, if the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case.

CRIMINAL REVISION.

Hamzah bin Mohamed Salleh (Senior Federal Counsel) for the Public Prosecutor.

Two accused in person.

Sharma J. (delivering oral judgment): I had called for the records in this case. The three accused were charged under section 379 of the Penal Code for having committed theft of 800 cocoanuts said to be valued at $104. At the end of the prosecution case the learned magistrate ruled that there was a *prima facie* case for the accused to answer, but in the very next breath he said:

"I am making this ruling not because I am satisfied with the case of the prosecution but because I want the accused to explain for themselves."

Having called upon the accused for their defence and having heard all of them, he observed:

"Having heard all the evidence the court is partially satisfied that the charge has been proved since the accused have not given any reasonable explanation as to the charge against them. However, in view of the facts which have been given by P.W.3 and P.W.4 whom the court feels have an axe to grind, the court is taking a lenient view of their offences."

With the greatest respect to the learned magistrate I have to observe that he failed to apply and totally ignored the very elementary principles which a court of criminal justice must strictly adhere to. It is the duty of the prosecution to prove the charge against the accused beyond all reasonable doubt and the court is not entitled merely for the sake of the joy of asking for an explanation or the gratification of knowing what the accused have got to say about the prosecution evidence to rule that there is a case for the accused to answer. The proof of a case against the accused depends for its support not upon the absence or weakness of the explanation on his part but on the positive affirmative evidence of his guilt given by the prosecution. Numerous rules have from time to time been suggested by the courts when dealing with the question of the guilt or innocence of the accused. The following principles are not only sound but well recognised in practice: —

(1) The onus of proving everything essential to the establishment of the charge against the accused lies on the prosecution;

(2) The evidence must be such as to exclude to a moral certainty every reasonable doubt of the guilt of the accused;

(3) In matters of doubt it is safer to acquit than to condemn.

A conviction cannot be sustained even if the court is satisfied that the prosecution story "may be true" unless and until it is found that the prosecution story "must be true." The burden of proof remains on the prosecution throughout the trial. If the learned magistrate was not satisfied with the case of the prosecution it was his duty to acquit and discharge the accused at the close of the prosecution case. The falsity of the defence does not relieve the prosecution from proving the prosecution case beyond reasonable doubt. The burden of proving guilt in a criminal charge is always on the prosecution except in certain cases with which we are not concerned here.

As the learned magistrate seems to have ignored the very basic principle of criminal law, it may perhaps serve a useful purpose to remind those administering justice in the lower courts that evidence discloses a *prima facie* case when it is such that *if uncontradicted* and *if believed* it will be sufficient to prove the case against the accused.

The following definition of "reasonable doubt" is often quoted:

"It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge."

It has again been said that " 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there." Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

A notice was issued to all the three accused but one of them has not in spite of several attempts been served. The issue of a notice on revision is to ensure that no order is made by the High Court to the prejudice of the accused. The order which I propose to make in this case is not going to be to the prejudice of the accused. I have therefore decided that it can serve no useful purpose to adjourn the hearing of this revision again. Several attempts have already been made to serve the notice on one of the accused. The other two accused are before me.

I am glad the learned deputy has very rightly informed the court that he does not at all support the order which was made by the learned magistrate.

The order of the learned magistrate is set aside. The order of conviction is also consequently quashed and an order of acquittal and discharge substituted therefor.

Conviction quashed.

LIM YAM TEK & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J. (Malaya), Suffian and Gill F.JJ.) April 1, 1971]

[Kuala Lumpur — Federal Court Criminal Appeal No. 31 of 1970]

Criminal Law and Procedure — Jury trial — Summing-up — Whether there was misdirection — When non-direction can be misdirection — Adequacy of defence put to jury — Powers of Federal Court in criminal appeals — Court of Judicature Act, 1964, s. 60(1).

This was an appeal against the conviction of the appellants on a charge of murder. The main question at the trial was who killed the deceased. The prosecution alleged that it was the appellants and two others. The appellants said they had nothing whatsoever to do with it. The defence was a complete denial. It was argued for the appellants that the summing-up was defective in that the defence case was never put to the jury and that they were in effect directed in such a manner as to discredit the defence witnesses.

Held, (Ong C.J. (Malaya) dissenting) dismissing the appeal: it is no misdirection not to tell the jury everything which might have been told and non-direction merely is not misdirection. The failure of the judge to refer in his summing-up to matters raised by the defence had not caused a misdescription of the whole bearing of the evidence.

Per Ong C.J., dissenting: "In this case, from first to last, the minds of the jury had been closed to the very question